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Luo Dan v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-609–12 OF 2017
MOHTARUDIN BAKI, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
13 MAY 2019

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Criminal Procedure — Statements — Cautioned statement — Whether mere fact accused's cautioned statement matched her testimony in court did not mean defence's story was true — Whether court had to properly evaluate all the evidence and test it against the probabilities of the case — Whether facts and evidence D *showed accused not an innocent carrier but guilty of willful blindness — Whether circumstances clearly showed accused knew she was transporting dangerous drugs*

The appellant, a female national of China, was convicted and sentenced to death by the High Court for trafficking in 4,401.5g of methamphetamine E which was found concealed in the heels of five pairs of women's shoes in a bag ('the bag') she was carrying at the Senai International Airport shortly after she arrived there on a flight from Hong Kong. Customs officers at the airport found the drugs after they scanned and searched the bag. The appellant's defence at her drug-trafficking trial was that she had no knowledge of the drugs F and was merely an innocent carrier. She said her boyfriend ('Charles') in Hong Kong had asked her to bring the bag, which apparently contained gifts, to Malaysia and hand it over to his friend who was supposed to meet her at Senai airport. The appellant was not given the recipient's contact number. The appellant said she examined the contents of the bag and did not suspect G anything amiss since it only contained clothes and shoes. In her cautioned statement to police, recorded a week after her arrest, the appellant gave details about Charles' cellphone number, his messaging number and his house address but police investigations on those details drew a blank as it was found that the cellphone number belonged to a person named Kamara while the house H address did not exist. In considering forensic evidence tendered in respect of the messages that were sent and received on the appellant's cellphone and iPad, the trial judge noted that the appellant had, in one message, commented that the bag was unusually heavy; yet she did not investigate why it was so. The exchange of messages also did not shed any light as to the identity of the person I who was to take possession of the bag from her at Senai airport. There was also nothing to indicate that Charles or anyone else had requested the appellant to transport the bag. The appellant had only mentioned Charles' name for the first time in her cautioned statement and prior to that never informed either the customs officers at the airport or the investigating officer that the bag belonged

to Charles. She had also removed the luggage tag from the bag on arrival at the airport. Based on all those circumstances, the trial judge concluded that the appellant was guilty of willful blindness and that she had knowledge of the drugs. The judge also found that: (a) since Charles (according to the appellant) was due to arrive in Malaysia hours after her arrival, there was no reason for the appellant to have brought the bag herself; (b) the cellphone messages showed that the appellant was transporting the bag on the instructions of someone in China; (c) she had deliberately refrained from making any inquiries about the contents of the bag; (d) she failed to rebut the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA'); and (e) she failed to raise any reasonable doubt on the overwhelming inference that she was trafficking in the impugned drug under s 2 of the DDA. The appellant's sole ground in her instant appeal against conviction and sentence was that she had no knowledge about the drugs and was an innocent carrier.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The fact that the appellant's cautioned statement was substantially the same as her testimony in court did not mean that what was said in the defence was true. The probability that Charles was the mastermind of the illicit operation to bring the impugned drugs into the country did not negate the fact that the appellant was complicit in and had the requisite knowledge of the drugs that she was carrying in the bag. Based on the facts of the case and the authorities on the point, the appellant was indeed willfully blind and clearly had knowledge of the drugs (see paras 21 & 24).

(2) Based on the information given by the appellant, efforts were made by the investigating officer to trace and contact Charles but they were futile. Although, as found by the trial judge, Charles or Kamara were not fictitious persons and might have been the owners of the drugs, that fact could not exculpate the appellant because she was not charged with ownership of the drugs but for trafficking in it. The forensic report on her cellphone and iPad showed communication about bringing the bag to Malaysia — it was not done on the spur of the moment. The sheer weight of the shoes in the bag should have made her suspect that something was hidden in the heels. The reason she gave for removing the luggage tag from the bag was flimsy and unconvincing. Also, the sheer ridiculousness of making a stopover at Senai airport (before proceeding to Kuala Lumpur International Airport) just to hand over the bag to someone whose contact number she did not know, were all reasons to infer that the appellant had the requisite knowledge about the illicit errand that she was undertaking. All of these pieces of evidence did not bode well for the appellant's defence of being an innocent carrier (see paras 17 & 19).

[Bahasa Malaysia summary

Perayu, seorang wanita warganegara Cina, telah disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar 4,401.5g methamphetamine yang dijumpai tersembunyi ditumit kaki lima pasang kasut wanit dalam sebuah beg ('beg tersebut') yang dibawanya di Lapangan Terbang Antarabangsa Senai sejurus selepas dia tiba di sama dengan pesawat daripada Hong Kong. Pegawai kastam di lapangan terbang itu menjumpai dadah selepas mereka membuat imbasan dan memeriksa beg tersebut. Pembelaan perayu semasa perbicaraan pengedaran dadahnya adalah bahawa dia tidak mempunyai pengetahuan tentang dadah itu dan hanya pembawa yang tidak bersalah. Dia mengatakan teman lelakinya ('Charles') di Hong Kong telah memintanya membawa beg tersebut, yang dikatakan mengandungi cenderamata, ke Malaysia dan menyerahkannya kepada kawannya yang sepatutnya menemuinya di lapangan terbang Senai. Perayu tidak diberikan nombor untuk menghubungi penerima itu. Perayu mengatakan dia telah memeriksa kandungan beg tersebut dan tidak mensyaki apa-apa kerana ia hanya mengandungi pakaian dan kasut. Dalam kenyataan beramarannya kepada polis, yang direkod seminggu selepas tangkapannya, perayu memberi butiran tentang nombor telefon bimbit Charles, nombor pesanannya dan alamat rumahnya tetapi siasatan polis berhubung butiran tersebut tidak mendapati apa-apa kerana nombor telefon bimbit tersebut dimiliki oleh seorang bernama Kamara manakala alamat rumah itu tidak wujud. Dalam mempertimbangkan keterangan forensik yang ditenderkan berkaitan pesanan-pesanan yang telah dihantar dan diterima pada telefon bimbit dan iPad perayu, hakim perbicaraan mengambil maklum bahawa perayu telah, dalam salah satu pesanan, membuat komen yang beg itu agak berat; namun dia tidak menyiasat kenapa ia sedemikian. Pertukaran pesanan juga tidak memberi identiti orang yang akan mengambil milikan beg tersebut daripadanya di lapangan terbang Senai. Tiada juga apa-apa yang menunjukkan bahawa Charles atau sesiapa yang lain telah meminta perayu untuk menghantar beg tersebut. Perayu hanya menyebut nama Charles untuk kali pertama dalam kenyataan beramarannya dan sebelum itu tidak pernah memberitahu sama ada pegawai kastam di lapangan terbang atau pegawai penyiasat bahawa beg itu adalah milik Charles. Dia juga telah mengeluarkan tanda bagasi daripada beg tersebut apabila tiba di lapangan terbang. Berdasarkan kesemua keadaan, hakim perbicaraan membuat kesimpulan bahawa perayu bersalah kerana sengaja tidak ambil peduli dan yang dia mempunyai pengetahuan tentang dadah tersebut. Hakim juga mendapati bahawa: (a) oleh kerana Chares (menurut perayu) sepatutnya tiba di Malaysia beberapa jam selepas ketibaannya, tiada sebab untuk perayu membawa beg tersebut sendiri; (b) pesanan-pesanan telefon bimbit itu menunjukkan bahawa perayu membawa beg tersebut atas arahan seseorang di Cina; (c) dia dengan sengaja mengelak daripada membuat apa-apa siasatan tentang kandungan beg tersebut; (d) dia gagal mematahkan andaian milikan di bawah s 37(d) Akta Dadah Berbabhaya 1952 ('ADB'); dan (e) dia gagal menimbulkan apa-apa

keraguan munasabah berhubung inferens yang banyak bahawa dia mengedar dadah yang dipersoalkan di bawah s 2 ADB tersebut. Satu-satunya alasan perayu dalam rayuannya ini terhadap sabitan dan hukuman adalah bahawa dia tidak mempunyai pengetahuan tentang dadah tersebut dan adalah pembawa yang tidak bersalah.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabtan dan hukuman:

(1) Fakta bahawa kenyataan beramaran perayu adalah secara substantial sama dengan keterangannya di mahkamah tidak bermaksud bahawa apa yang dikatakannya dalam pembelaan adalah benar. Kebarangkalian bahawa Charles adalah perancang operasi haram untuk membawa dadah yang dipersoalkan masuk ke negara ini tidak menafikan fakta bahawa perayu bersubahat dalam dan mempunyai pengetahuan tentang dadah tersebut yang dibawanya dalam beg tersebut. Berdasarkan fakta kes dan autoriti perkara tersebut, perayu sememangnya dengan sengaja tidak ambil peduli dan jelas mempunyai pengetahuan tentang dadah tersebut (lihat perenggan 21 & 24).

(2) Berdasarkan maklumat yang diberikan oleh perayu, usaha telah dijalankan oleh pegawai penyiasat untuk mencari dan menghubungi Charles tetapi tidak berjaya. Walaupun, seperti yang didapati oleh hakim perbicaraan, Charles atau Kamara bukan orang rekaan dan mungkin pemilik dadah tersebut, fakta itu tidak boleh membebaskan perayu kerana dia tidak dituduh memiliki dadah tetapi mengedarnya. Laporan forensik pada telefon bimbit dan iPadnya menunjukkan komunikasi tentang membawa beg tersebut ke Malaysia — ia tidak dilakukan tiba-tiba. Berat kasut-kasut dalam beg tersebut sepatutnya telah membuatnya mensyaki sesuatu disembunyikan pada tumit kasut tersebut. Alasan yang diberikannya kerana mengeluarkan tanda bagasi itu daripada beg tersebut tidak kukuh dan tidak meyakinkan. Juga, perbuatan membuat transit yang tidak masuk akal di Lapangan Terbang Senai (sebelum meneruskan perjalanan ke Lapangan Terbang Antarabangsa Kuala Lumpur) hanya untuk menyerahkan beg tersebut kepada seseorang yang mana dia tidak mempunyai nombor telefonnya, merupakan semua sebab untuk membuat inferens bahawa perayu mempunyai pengetahuan tentang penghantaran haram yang dilaksanakan itu. Kesemua keterangan tersebut tidak selari dengan pembelaan perayu sebagai pembawa yang tidak bersalah (lihat perenggan 17 & 19).]

Notes

For cases on cautioned statement, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5457–5472.

Cases referred to

Iwuchukwu Amara Tochi and another v PP [2006] 2 SLR 503, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others [2001] 1 All ER 743, HL (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314; [2005] 1 CLJ 398, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2017] 1 MLRA 499, CA (refd)
Tan Kiam Peng v PP [2008] 1 SLR 1, CA (folld)

Legislation referred to

Criminal Procedure Code ss 113, 116B
Customs Act 1967 s 116A
Dangerous Drugs Act 1952 ss 2, 37(d), First Schedule

Lim Chi Chau (Lim Chi Chau & Co) for the appellant.
Nik Syahril Nik Ab Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

[1] The appellant, a Chinese national, was charged and convicted by the High Court on 21 December 2017 of trafficking in 4,401.5g of methamphetamine at the Special Passengers Examination Unit of Senai International Airport ('the airport'). On 28 January 2019 we heard her appeal against the said conviction and the mandatory death sentence imposed by the learned High Court judge and dismissed the same. Our reasons for so deciding are laid out in this judgment but first, we would reproduce the amended charge against the appellant, which is in Bahasa Malaysia, below:

> Bahawa kamu pada 20 Oktober 2014 jam 9.10 malam di Unit Khas Pemeriksaan Penumpang (UKPP), Lapangan Terbang Antarabangsa Senai, di dalam Daerah Kulaijaya, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 4,401.5 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

THE PROSECUTION CASE

[2] As in many of similar drug trafficking cases which have been brought before our courts in Malaysia, the appellant was arrested when the scanning of her luggage, which in this case was a blue trolley bag ('the bag') by the customs officer on duty at the airport, that is PW9, revealed a suspicious image which then prompted a more thorough physical examination of the bag by another

customs officer, that is PW8, which then led to his arrest by PW10, also another customs officer. The drug in this case were concealed in the heel of five pairs of woman's shoes found in the bag. The chemist (PW6) found the said drug was of the type and weight as stated in the charge. His report was tendered as exh P23 at the trial where he stated, and this is confirmed in his evidence, that methamphetamine is listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA'). At the close of the prosecution's case, the learned High Court judge found based on the evidence adduced, the brief summary of which we had reproduced above, that the presumption of knowledge under s 37(d) of the DDA be raised against the appellant. As for the ingredient of trafficking, His Lordship utilised the definition of trafficking under s 2 of the DDA which is 'transporting' or 'carrying' as well as the Privy Council case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 which held that where a large quantity of drugs is found in possession of a person, common sense dictates that an inference be made that it was not intended for his personal consumption and convincing evidence is needed to rebut that inference.

[3] We have intentionally made a cursory narrative of the evidence by the prosecution because as evidenced by learned counsel's written submission as well as the oral one before us, the appeal was centered only on one issue which was the defence raised by the appellant, that is, she had no knowledge of the impugned drug and was an innocent carrier. However we must mention that in the second paragraph of his written submission at p 22 thereof, learned counsel did raise this one issue about the chemist evidence. He submitted that:

> The learned trial judge was wrong in not accepting the appellant's submission that it is not sufficient for a chemist to give evidence of the various test the chemist had conducted and the result obtained but it is also incumbent on the chemist to first confirm that all the apparatus used complied with the necessary provision of the law as the weight of the drugs would determine under which section of the Dangerous Drugs Act, 1952 (DDA) an accused should be charge (see *PP v Chew You Choi* [1990] 2 MLJ 444 (Tab 9)) and as such the learned trial judge was wrong in concluding the appellant was engaged in the act of trafficking in the drugs.

Nevertheless, at the hearing of the appeal, this issue was abandoned by him.

THE DEFENCE

[4] In essence, the defence of the appellant was that the bag containing the drug was given to her by her Negro boyfriend called Charles Dion ('Charles'), through a male African friend of his. Charles was supposed to travel to Malaysia together with her on the same day and their trip was enroute to Mauritius but he changed his plan at the last minute because he had to be in Beijing. According to the appellant, their plan was to get married in Mauritius. Charles

allegedly promised to take the next available flight to Malaysia to join her here. Her flight ticket on the said date which was via Hong Kong, with a stopover in Kuala Lumpur before going to Johore Bahru, was brought by Charles and Charles told her that a friend of his would wait for her at Senai Airport. However she was not given that friend's contact number. The appellant's return flight on the 23 October 2014 was from Johore Bahru to Hong Kong with a stopover in Kuala Lumpur (see the itinerary receipt at p 1777 of Vol 30 of the appeal record).

[5] As for the bag, she was told by Charles that it contained clothings and shoes which were gifts for a friend in Malaysia. That bag was handed over to her by that African friend of Charles at Guanzhou's Huadiwan MRT Station and she said she spoke to Charles using that man's handphone after the handing over of the bag. Thereafter the appellant said she checked into a hotel in Shenzhen where she examined the content of the bag and found nothing suspicious in it. She then put in her own clothings inside the bag.

[6] When she arrived at the airport, the appellant said she called Charles to inform him of her arrival and then voluntarily asked the customs officer whether she was required to scan her bag. It was not that she was directed to do so as testified by PW7. During the time the physical examination of the bag was conducted by the customs officer, Charles called her a number of times but she was not allowed to respond to those calls as well as those calls and messages made to her mini iPad. The appellant admitted that she had been to Malaysia a total of five times with friends, colleagues or Charles prior to this fatal trip. It was put to her in cross-examination that she was a paid drug courier which she of course disagreed. It was also brought up in her cross-examination, which she did not deny, that she had removed the luggage tag to the bag.

[7] In her caution statement (exh D55 at pp 1797–1805 of Vol 3(d) of the appeal record) which was in substance the same with her sworn testimony in court, the appellant did mention that the luggage tag was removed because that was her normal habit because she said with the tag her bag would not look nice. In that statement she mentioned that their planned trip to Mauritius was on 21 October 2014 and that the stopover in Johor Bahru was to handover the bag to Charles's friend. She said she was supposed to take a taxi to Kuala Lumpur after handing over the bag and had a hotel booking in Puchong. She was asked why her ticket showed that her return trip was from Johor Bahru to Kuala Lumpur International Airport and then Hong Kong on 23 October 2014 and she answered she didn't know because Charles's gave it to her and he had arranged everything. In the caution statement, the appellant also gave Charles handphone number, messaging application number and his house address as well as its location, that is in front of 'Hotel Ya Ju Le'. She said Charles was

scheduled to arrive in Kuala Lumpur International Airport from Hong Kong on 20 October 2014 at 8.45pm.

[8] The learned High Court judge rightfully labelled the defence as one of an innocent carrier and considered it, as per the established case authorities on this defence, the concept of wilful blindness. His Lordship considered the forensic evidence tendered in respect of the SMS data in the handphone seized from the appellant (exh P35) and its translation ((exh P35(a)(1) at pp 1398–1577 and pp 1518–1757 respectively)) in respect of one message sent by the appellant to say that the bag was heavy. His Lordship said it must have been unusually heavy (consistent with the observation made by the customs officers particularly with regard to the shoes) for otherwise it would not have moved the appellant to make the said comment. She should therefore follow-up with Charles about the content of the bag, said His Lordship.

[9] The learned High Court judge also highlighted the exchange of messages between the appellant and one Ossy in relation to the appellant's request for a fee which His Lordship said, despite no specific reference to carrying of the bag but from the content, those exchanges relate to that purpose. According to the investigating officer (PW21), there was nothing in the said report to indicate that Charles or anyone else had requested the appellant to carry the bag. The appellant also omitted to ask from Charles or Ossy who she should hand over the bag at the Airport even though she and Charles were initially supposed to travel together. His Lordship also noted that given that Charles was supposed to arrive just hours apart from the appellant on 20 October 2014, there was no need for her to bring the bag. The learned High Court judge therefore concluded that it can be inferred that she knew the actual content of the bag and was guilty of wilful blindness.

[10] He also dismissed her explanation for removing the luggage tag — it was more of in anticipation or hope to disavowing all connection to the bag in case it was intercepted by the authorities. There was also no hotel booking under Charles or the appellant's name at the said Hotel YB One Sdn Bhd in Puchong as mentioned in the caution statement. His Lordship noted that as stated by the appellant, it is not reasonable for the appellant to go from Johor Bahru to Puchong via Kuala Lumpur by flight when as asked of her in the caution statement she said it because Charles told her it is cheaper to go there by flight than in a taxi. The learned High Court judge noted that it would certainly be cheaper to exit KLIA instead and held, the reason given by her that the flight purchased for her was virtually free even after taking into account the taxi fare from Johor Bharu to Puchong is devoid of all reason.

[11] On the Alcontara notice in respect of Charles, the evidence of the investigating officer was that the handphone number of Charles she dialled was

not answered because it was not in service and through Interpol's help, the owner of that handphone number was one Kamara. The address of Charles as stated in the caution statement was also found to be non-existent.

[12] His Lordship noted too that the appellant did not inform the customs officers at the airport and the investigating officer that the bag belonged to someone else and only brought up Charles name in her caution statement recorded seven days after her arrest.

[13] As for the appellant's evidence in court that she had voluntarily asked the customs officer whether her bag needed to be scan, learned counsel for appellant referred to 'Nota Taklimat Representasi' (exh D56 at pp 1808–1816 of Vol 3(d) of the appeal record) prepared by a deputy public prosecutor Nabeela Shakina bt Abdul Razak ('DW2') in which the said witness stated that same fact under the heading 'Kelemahan kes pendakwaan'. However, DW2 admitted in court that what she said under that heading at para 6.1(b) was errorneous. The said paragraph reads:

> b. Pegawai Kastam PiK Zainon mengesahkan bahawa OKT telah menghampiri beliau dan bertanya sama ada beliau perlu mengimbas beg-begnya atau tidak. Namun demikian, setelah PiK Zainon mendapati beg OKT tiada tag, dan setelah ditunjukkan tag bagasinya yang telah dicabut, PiK Zainon berpuasahati bahawa OKT adalah daripada penerbangan antarabangsa, barulah beliau mengarahkan OKT mengimbas beg.

[14] PiK Zainon was PW7 and recalled by the prosecution as a rebuttal witness and her statement recorded under s 116A of the Customs Act 1967 was tendered as exh P58. That statement was part of the evidence submitted for DW2's consideration upon receipt of the said letter of representation by the appellant. PW7 clearly said, as evidenced in her statement, that the appellant was directed to scan the bag and not as alleged by the appellant. Based on the said evidence, the learned High Court judge did not accord any weight to the content of exh D56, choosing to believe the evidence of PW7 instead. In this regard, His Lordship also held that the absence of the CCTV recording was not prejudicial to the prosecution case.

[15] On the allegation that there were three statements recorded from the appellant, the learned High Court judge agreed with the prosecution that reliance by the learned counsel for the appellant on question No 59 in exh D55 to support that allegation was wrong. The said question which reads:

> Kenapa kamu tidak pernah ceritakan berkenaan tiket penerbangan kamu balik ke HKG pada 23.10.2014?

does not mean, said His Lordship that there was a statement recorded on the

said date but as explained by PW12, it was just questioning the appellant about the actual date of the flight from Kuala Lumpur to Hong Kong and the answer by the appellant to that question is:

> Tiket itu Charles belikan sahaja supaya saya boleh mendapat boarding pass saya kerana saya akan ke Mauritius dengannya pada 21.10.2014.

There was therefore only one statement recorded from the appellant said the learned High Court judge, and which conclusion, based on the evidence as considered by him above we fully agree with.

[16] The learned High Court judge finally concluded that from the forensics report, the appellant was communicating with someone in China on the receipt and carrying of the trolley bag to Malaysia and whether it was Charles Dion, Charles or Kamara or someone else was immaterial. She was carrying it on instruction from someone in China and was guilty of wilful blindness for she deliberately refrained from asking the obvious simply because she knew what the answer was. She had knowledge of the nature and identity of the impugned drug, said His Lordship further, and has failed to rebut the presumption under s 37(d) on a balance of probabilities. From the fact that she carried the bag from Hong Kong to Malaysia, and the concealment of the drugs and its weight, the learned High Court judge also found that she was trafficking the drug under s 2 of the DDA and failed to raise a reasonable doubt that it was so.

THE APPEAL

[17] As submitted orally before us as well as in the written submission of learned counsel for the appellant, the crux of the appeal was whether the appellant had knowledge of the impugned drugs. Learned counsel submitted that there was no proper investigation on Charles as raised by the defence in court and in particular in the caution statement. However, with respect, as stated earlier, the investigating officer did attempt to call Charles at the number given by the appellant and also checked his house address which was found to be false. She had requested for help from Bukit Aman to trace the particulars of the owner of that handphone number of Charles as given by the appellant in her caution statement and was told by Bukit Aman that the owner was one 'Kamarah'. In the representation note it was stated that the registered owner of the handphone number was a Sierra Leonist named Foday Abu Kamara who was linked with an Ugandan caught with 756.5g of methamphetamine by the customs in Guangzhou. Thus, the requisite effort has been made, unlike the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 raised by learned counsel in his submission where there was no investigation done at all. Granted as stated by the learned High Court judge that Charles or Kamarah (or spelt as Kamara) was not a fictitious person and was the owner of the drugs, that fact

could not exculpate the appellant because the charge was not for ownership of the drugs but trafficking in it. As the learned High Court judge had raised in his judgment, the forensic report on her handphone and the iPad shows communication about bringing the bag here to Malaysia — so it was not done on a spur of the moment. Further, the sheer ridiculousness of the act in making a stopover at the airport before proceeding to KLIA just to send the articles of clothings and shoes is an added reason to infer that she had the requisite knowledge about the illicit errand that she was undertaking. Of course, as submitted by the learned deputy public prosecutor, the sheer weight of the shoes would also alert her that something was hidden in the heels. The appellant after all is a woman and it is reasonable to expect that she would be familiar with woman's shoes and the unusual weight of the ones she was carrying — not just one or two grammes but more than 4kg of the drugs that were hidden in five pairs of shoes, should have reasonably aroused her suspicion. Added to that is the fact that she had agreed to make that detour to the airport even without knowing the contact person she was supposed to deliver the bag to. This is another imponderable act which does not bode well for her defence of being an innocent carrier.

[18] As for her conduct in asking that the bag be scanned, as stated earlier, the said evidence had been rejected by the learned High Court judge and we say rightly so for DW2 and PW7 had given their evidence and explanation for the said statement in the letter of representation and most tellingly, the appellant in her own caution statement said she was directed to scan the bag; not that she volunteered to do so. Besides, there was nothing to hinder the appellant from requesting and producing the said CCTV recording herself if it is so crucial to her defence. Viewed in this context, the absence of the CCTV recording from the evidence adduced by the prosecution is not fatal to its case.

[19] Similar with the situation which befell the respondent in *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2017] 1 MLRA 499 and a host of other cases involving foreign drug couriers convicted and sentenced to death by our courts, the appellant too, using the words in *Herlina*'s case, was not a hapless victim. As pointed out by the learned High Court judge, she had been to Malaysia five times previously and must be familiar with the procedures at our airport. The reason she gave for taking off the baggage tag is flimsy and unconvincing which further adds to the reasons why her defence of being an innocent carrier should be rejected. Learned counsel for the appellant had in his written submission quoted at length the Singapore case of *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR 1 on the corollary concept of wilful blindness. With respect what was said in the said case on this particular defence does not impinge on the rejection of it in this case before us by the learned High Court judge. This is because although the court in the cited case held that it was a wrong assumption that 'there was some

sort of positive legal duty' not to turn a blind eye and there was no such a duty prescribed by the Act but thereafter this was what the court held:

> There could be various reasons why a court might not believe the accused person, or find that he had not rebutted the presumptions. *The fact that he made no attempt to check what he was carrying could be one such reason.* Whether the court would believe a denial of knowledge of the articles in the accused person's possession (made with or without explanation or reasons) would depend on the circumstance of the individual case. The trial judge then referred to *Yeo Choon Huat v PP* [1998] 1 SLR 217 at [22]:
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> > [1] Ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination.
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> The above passage, however, was from the judgment in *Ubaka v PP* [1995] 1 SLR 267 and cited with approval by both the minority judgment in *PP v Hla Win* [1995] 2 SLR 424, as well as in the unanimous judgment in *Yeo Choon Huat v PP*. It is also pertinent that the same coram sat in both cases (*Yeo Choon Huat v PP* and *PP v Hla Win*). It will be gleaned from these cases that the true principle is that, ultimately, a failure to inspect may strongly disincline a court from believing an 'absence of knowledge' defence. Therefore, to say, as in this case, that the first appellant thought it was chocolates was another way of saying he did not know that he was carrying drugs. Given the evidence, including the evidence that the first appellant did not inspect the articles when he could have done so (the turning of the blind eye), the court was entitled to find that the presumption had not been rebutted. (Emphasis added.)
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> [124] *What is clear from the above observations is that the accused is under no legal obligation not to turn a blind eye. However, if he does in fact turn a blind eye, that could, on the facts, be taken to be wilful blindness on his part. If so, this would be tantamount to actual knowledge in law, and the accused would have failed to have rebutted the presumption of knowledge under s 18(2) of the Act.* The above observations are important in as much as they clarify what might otherwise have been a misunderstanding of some observations expressed at first instance in *Tochi*. (Emphasis added.)

[20] We must say that *Tan Kiam Peng*'s case has laid down comprehensively the central principles relating to wilful blindness which are useful guidance for us here and these as stated in the said judgment are:

(a) wilful blindness is treated, in law, as being the equivalent of actual knowledge;

(b) suspicion is legally sufficient to ground a finding of wilful blindness provided the relevant factual matrix warrants such a finding and the accused deliberately decided to turn a blind eye. However, that suspicion must, as Lord Scott perceptively points out in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others* [2001] 1 All ER 743, 'be firmly grounded and targeted on specific facts'. Mere 'untargeted or speculative suspicion' is insufficient;

(c) wilful blindness is distinct from recklessness which theoretically falls short of actual knowledge. Wilful blindness is a combination of suspicion coupled with a deliberate decision not to make further inquiries, whereas the recklessness that has been referred to by Prof Williams refers to recklessness in terms of the accused's conduct in the context of circumstances which would not otherwise have aroused suspicion on the part of the accused; and

(d) whether or not a presumption (here, of knowledge) under the Act is rebutted on a balance of probabilities depends, in the final analysis, on the precise factual matrix concerned. As Choo Han Teck J put it in *Iwuchukwu Amara Tochi and another v Public Prosecutor* [2006] 2 SLR 503 (at para [9]):

> Rebutting the statutory presumption is a matter of fact, and is not different from any other fact-finding exercise save that the law requires that a person rebutting a statutory presumption does so on a balance of probabilities. It is not sufficient for him merely to raise a reasonable doubt.

[21] Applying what was said above to the facts of this case, we are constrained to say that the appellant indeed was wilfully blind and clearly had knowledge of the drugs as stated earlier.

LAST ISSUE

[22] The other complaint of the appellant is the admission of PW7's statement recorded under s 116A of the Customs Act 1967 (Revised 1980) as exh P58. The purpose of that admission was to rebut the defence contention on the voluntary scanning of the bag as stated by DW2 in the representation note which she made based on the statement taken from PW7. Learned counsel referred to s 113 of the Criminal Procedure Code and submitted the said statement cannot be admitted under that section and also not under s 116B of the said Act. The relevant part of the said s 116B reads as follows:

> 116B Admissibility of statements in evidence
>
> (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or whether it is oral or in writing, made at anytime, whether before or after the person is charged and whether in the course of an investigation under this Act or not, and whether or not wholly or partly in answers to questions, *by an accused person* to or in the hearing of any officer of customs, and whether or not interpreted to him by any other officer of customs or any other person, shall, notwithstanding any written law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

(2) No statement made under subsection (1) shall be admissible or used in cross-examination or for the purpose of impeaching the credit of the person making the statement if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him. (Emphasis added.)

[23] Obviously s 116B is only for statement made by an accused person. The admission of PW7's statement did not run afoul of the said s 113 because it was for the very purpose as stated earlier which was to show the mistake made by DW2 in the representation note. Therefore, we must say, with respect to the learned defence counsel that the said complaint was wrongly taken. That course of action was rightly adopted as the said statement of PW7 did not tally with what DW2 alleged was said by PW7 in that representation note.

[24] Our last words on the defence is this. The fact that what was said in the caution statement is substantially the same as the appellant's testimony in court does not mean that what was said in the defence was the truth (see *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398). Although the probable truth is that Charles was the mastermind of this illicit operation to bring the said drugs into our country but that does not negate the fact that the appellant was complicit in and had the requisite knowledge of the drugs she was carrying in the bag and concealed in the heel of the shoes.

[25] For the above reasons, the appeal was dismissed and the conviction and sentence affirmed as we find no merit in the contention of learned counsel that the learned High Court judge has failed to consider the defence of the appellant.

Appeal unanimously dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar